IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

HOLDING AN EQUITY COURT

Tuesday, August 29, 1933.

Economy Dairy Co., Inc., Plaintiff,	:	
vs	:	Equity No. 56058.
Henry A. Wallace, Defendant.	:	
Milton R. Beck, Plaintiff,	:	
vs	:	Equity No. 56059.
Henry A. Wallace, Defendant.	:	

Transcript of Proceedings

(In Part)

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy Company, Inc., and Milton R. Beck, In care of Dodds & Burkinshaw, Shoreham Building, Washington, D. C. Plaintiff,	Equity No. 56058
vs.	Equity No._____
Henry A. Wallace, The Secretary of Agriculture, Washington, D. C. Defendant.	

BILL OF COMPLAINT

TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA:

The plaintiff respectfully represents as follows:

1. That Milton R. Beck, the plaintiff, is a citizen of the United States and a resident of the State of Illinois, and is, and at all times mentioned in this bill of complaint has been, engaged in business under the trade name "Southwest Dairy Products" at number 3941 South Harlem Avenue, Stickney, Illinois.

2. That the defendant, Henry A. Wallace, is the Secretary of Agriculture of the United States, a citizen of the United States and a resident of the District of Columbia; and is sued in this action in his official capacity as the Secretary of Agriculture of the United States.

3. That the plaintiff is engaged, at his said place of business, as an intra-state dealer in milk and cream, at retail; that is to say, the plaintiff buys, solely within the State of Illinois, milk and cream from wholesale dealers therein, and sells, wholly within said state, such milk and cream, at retail, to such persons as call therefor at his said place of business; plaintiff's sale of milk and cream being wholly confined to transactions at his said place of business, and without delivery service.

4. That, by reason of the fact that plaintiff's said retail business does not involve delivery service, plaintiff is enabled to and does sell milk and cream at substantially lower prices than it would be necessary for him to charge therefor if the expense of delivery service were involved; and that plaintiff's customers, who patronize plaintiff because they do not desire to incur the added expense of delivery service, are enabled, by purchasing at plaintiff's said place of business, to avoid the expense of such undesired delivery service, which service would, if rendered, require a great increase in the price of both milk and cream.

5. That plaintiff has from time to time invested large sums of money, to wit, more than three thousand dollars, in the establishment of his said business, and has created and developed a large and valuable trade with a great number of customers with whom he has established an extensive and valuable good-will; and that the value of the matters and things in dispute herein between the plaintiff and the defendant exceeds three thousand dollars, exclusive of interest and costs.

6. That on, to wit, May 12, 1933, an Act then passed by Congress was approved as a law and a Statute of the United States, and which said Act was entitled as follows:

> "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes."

7. That thereafter, and on or about July 28, 1933, said defendant, acting under the pretended authority of the statute to which reference is made in paragraph six of this bill of complaint, and claiming and assuming to possess thereunder a lawful power to control and regulate, among others, plaintiff's said business, did publish and issue a so-called license, entitled "License for Milk -- Chicago Milk Shed", and which said co-called license was and is in words and figures as set forth in "Exhibit A", hereto attached and hereby made a part of this bill of complaint as fully as if herein set out.

8. That the plaintiff is a "Distributor" as defined in Section 1, Paragraph "C" of said purported license; and that his said place of business is situate within the "Chicago Metropolitan Area" as defined in Section 1, paragraph "D" thereof.

9. That, as shown in said "Exhibit A", hereunto attached, the said defendant, pretending, as aforesaid, to act under the authority of said statute, assumed to fix a stated price to be exacted by wholesale dealers from this plaintiff for all milk and cream sold to this plaintiff from and after August 1, 1933, for resale in his said business, and also assumed to fix a stated price to be paid by plaintiff, to each producer of milk and cream from whom plaintiff should purchase milk or cream for resale in his said business, and also assumed to fix a stated retail price to be exacted by this plaintiff from his customers; that is to say, the said purported license provides in effect that the price of all milk purchased by plaintiff from wholesale dealers in said the "Chicago Metropolitan Area" shall be so computed as to result in the payment of approximately seven and one-half cents per quart therefor; and, in the event milk is purchased by plaintiff directly from the producers thereof the price to be paid to such producers is so to be computed under the ratio prevailing at the time of filing this bill, as to result in the payment of approximately three and one-half cents per quart. And further that the retail price to be charged plaintiff's customers therefor is fixed in said license at ten cents per quart, whereas plaintiff now sells milk at six and one-quarter cents per quart. And,

further, that the said pretended license in effect purports to fix the ratio between the purchase and the retail sale prices of cream in such a manner and degree as to result in charging plaintiff's customers approximately three times the amount to be paid to the producers of such cream; and which said fixed prices would, without delivery service, immediately operate to deprive plaintiff of his customers, destroy their valuable good-will and wholly ruin plaintiff's said business.

10. That plaintiff is advised and believes that the statute mentioned in paragraph six of this bill of complaint is invalid, void, unauthorized and contrary to the provisions of the Constitution of the United States, particularly in that:

(A) Congress has no authority under the Constitution of the United States to enact legislation to enable the Secretary of Agriculture to fix prices at which plaintiff must sell milk and cream at retail.

(B) Congress has no authority under the Constitution of the United States to enact legislation to enable the Secretary of Agriculture to fix prices which others must charge for milk and cream to be sold to plaintiff.

(C) Congress has no authority under the Constitution of the United States to enact legislation to enable the Secretary of Agriculture to fix prices which plaintiff must charge for milk and cream sold by plaintiff in intra-state commerce.

(D) Congress has no authority under the Constitution of the United States to enact legislation to enable the Secretary of Agriculture to fix prices which plaintiff must charge for milk and cream sold by plaintiff in intra-state commerce.

(D) Congress has no authority under the Constitution of the United States to enact legislation to enable the Secretary of Agriculture to fix prices that others must charge plaintiff for milk and cream sold to plaintiff in intra-state commerce.

(E) Said statute deprives the plaintiff of liberty, property, and his means of livelihood, without due process of law.

(F) Said statute denies to plaintiff the equal protection of the law.

(G) Said statute denies to plaintiff the privileges and immunities of a citizen of the United States.

(H) Said statute provides for unreasonable searches and seizures of the person, house, property and effects of the plaintiff.

(I) Said statute delegates legislative power to the Secretary of Agriculture.

(J) Said statute denies to plaintiff those certain rights retained by the people under the terms of Amendment IX of the Constitution of the United States.

(K) Said statute provides for the taking of private property from the plaintiff for public use without just compensation.

(L) Said statute delegates judicial power to the Secretary of Agriculture.

(M) Said statute interferes with plaintiff's constitutional right to carry on his business and to freely contract in respect thereto.

(N) Said statute attempts to make it a criminal offense for the plaintiff to sell milk and cream at prices satisfactory to himself and to his customers.

(O) Said statute attempts to subject the plaintiff, in the operation of his business, to a municipal ordinance of the City of Chicago, and this when plaintiff is neither a resident of the City of Chicago nor engaged in business therein.

11. That plaintiff is advised and believes that the aforesaid purported license is unauthorized, invalid, and void in that:

(A) The terms and conditions of said license do not tend to effectuate the policy of said statute as set forth and declared in section 2 thereof.

(B) The terms and conditions of said purported license prevent and tend to prevent the effectuation of the said declared policy of said statute, as set forth and declared in Section 2 thereof.

12. That plaintiff is advised and believes that said license is invalid, void, unauthorized, and in contravention of the provisions of the Constitution of the United States in that:

(A) Each and every one of the terms and conditions contained in Part III, Section 1 to 7, inclusive, of said license, deprives the plaintiff of his liberty and of his property, without due process of law.

(B) Each and every one of the terms and conditions contained in Part III, Section 1 to 7, inclusive, of said license denies to the plaintiff his privileges and immunities as a citizen of the United States.

(C) The terms and conditions contained in Part II, Section 5, of said license provide for unreasonable searches and seizures of the person, house, papers and effects of the plaintiff.

(D) Said license is designed to take private property of the plaintiff for public use without just compensation.

(E) The terms and conditions contained in Part III, Section 2, 4, and 6 of said license, purport to delegate powers and authority granted by Congress to the Secretary of Agriculture to other persons, contrary to the Constitution of the United States.

(F) Said license is discriminatory and void in that it fails to recognize the Constitutional right of plaintiff to sell milk and cream directly to his customers at his place of business at a fair and reasonable price, considering the fact that no delivery service is rendered to said customers.

13. That plaintiff now conducts and operates his business in a wholly legal and proper manner but that his manner and method of operation thereof is in violation of the terms and restrictions of said purported license; and that plaintiff cannot conform to the terms and restrictions of said purported license and continue longer in his said business.

14. Plaintiff is informed and believes that it is the purpose and intent of the defendant, and of his agents, servants, employees and assistants, to attempt to enforce the said statute and all of the regulations, restrictions and rules purporting to have been promulgated under the authority thereof, as against this plaintiff, among others, and to attempt, under color of said statute and of the said regulations, restrictions and rules, to force this plaintiff to give up and abandon his said business and means of livelihood.

15. That plaintiff is informed and believes that it is the purpose, intent and threat of said defendant, and of his agents, servants, employees and assistants, to attempt to enforce said purported act in each and all of its terms and to attempt to enforce all regulations, restrictions and rules promulgated by defendant under color thereof, by assuming to revoke said pretended license and by instigating criminal prosecutions of the plaintiff.

16. And that for the reasons and in the manner last aforesaid plaintiff will be subjected to a multiplicity of prosecutions, and to the expenditure of large sums of money in defense thereof, for alleged violations of said act; or, that plaintiff will be wrongfully and by duress and coercion forced into compliance with the terms of the aforesaid license, regulations, restrictions and rules, which will inevitably result in the ruin of his business and in the loss of his means of livelihood.

17. That plaintiff has no plain and adequate remedy at law and unless the defendant, his agents, servants, employees, and assistants shall be restrained from attempting to enforce, as against plaintiff, said unconstitutional and void statute and said unconstitutional and void regulations, restrictions and rules plaintiff's said business will be wholly and immediately destroyed, together with his right to engage therein, as a means of livelihood, and that plaintiff will thereby suffer great and irreparable loss, injury and damage.

WHEREFORE, THE PREMISES CONSIDERED, THE PLAINTIFF PRAYS:

FIRST: That this Honorable Court may cause its writ of subpoena to be issued, directed to the defendant, commanding him to appear and answer the allegations of this bill.

SECOND: That the said statute be declared to be in violation of

plaintiff's rights in that it is not authorized by the Constitution of the United States, and is in violation thereof.

THIRD: That said purported license be declared to be in violation of the rights of plaintiff because not authorized under the Constitution of the United States, and in violation thereof.

FOURTH: That this Honorable Court issue a decree declaring said statute to be null and void, and vacating and annulling said license.

FIFTH: That the defendant, Henry A. Wallace, and his assistants, deputies, agents and attorneys may be enjoined and restrained, both pending this suit and permanently at the final hearing thereof, from enforcing or attempting to enforce against this plaintiff the said license, or any other order which he has issued or may hereafter issue under said unconstitutional statute.

SIXTH: And for such other and further relief as to this Honorable Court may seem meet and proper.

(Sgd) Milton R. Beck

Nugent Dodds

Neil Burkinshaw

Joseph E. Gray

Edward J. Hess
Attorneys for Plaintiff.
930 Shoreham Building,
City.

DISTRICT OF COLUMBIA, ss:

Milton R. Beck, being first duly sworn, deposes and says that the matters and things contained in the foregoing bill of complaint by him subscribed are true.

(Sgd) Milton R. Beck

Subscribed and sworn to before me this 11th day of August, 1933.

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IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy Company, Inc., and Milton R. Beck, In care of Dodds & Burkinshaw, Shoreham Building, Washington, D. C. Plaintiff,	)	Equity No. 56058
vs.	)	Equity No. 56059
Henry A. Wallace, The Secretary of Agriculture, Washington, D. C. Defendant.	)	

RULE TO SHOW CAUSE

Upon consideration of the bill of complaint filed herein, it is this 11th day of August, 1933, ordered that the defendant, Henry A. Wallace, Secretary of Agriculture of the United States of America, show cause, if any he has on or before ten o'clock A. M. on 21st day of August, 1933, why he sould not be enjoined and restrained as prayed in said bill of complaint; provided that a copy of this rule be served upon said defendant on or before 14th, August, 1933.

By the Court:

Joseph N. Cox
JUSTICE

A True Copy
Attest:
Frank E. Cunningham, Clerk,
By H. M. Hull, Asst. Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy Company, Incorporated, In care of Dodds & Burkinshaw, Shoreham Building, Washington, D. C., Plaintiff,	)	In Equity No. 56058
v.	)	
Henry A. Wallace, The Secretary of Agriculture, Washington, D. C., Defendant.	)	

MEMORANDUM BRIEF FOR THE DEFENDANT IN OPPOSITION TO RULE TO SHOW CAUSE

THE BILL IS UNTIMELY AND PREMATURE AND WITHOUT THE NECESSARY EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The terms of the Agricultural Adjustment Act, and the affidavits pointing out regulations by the Secretary of Agriculture, filed herein, show that the court should not entertain jurisdiction to issue an injunction because of the following decisive factors:

1. The Agricultural Adjustment Act gives the Secretary of Agriculture, with the approval of the President, the power to make such regulations as may be necessary to carry out the powers vested in him by the Act. (Par. 10 (c).).

2. The Act also gives the Secretary power to issue licenses permitting distributors to engage in the handling, in the current of interstate commerce, of milk and the products thereof, and to prescribe the terms and conditions of such licenses. (8 (2).)

3. Plaintiff may apply for a modification of the license and procure a hearing thereon.

4. Plaintiff may at such hearing raise the question of legality or applicability of any or all the provisions.

5. No action can be taken by the Secretary as to suspension or revocation of the license except after due notice and opportunity for a hearing.

6. At such hearing plaintiff may raise any question as to the legality or applicability of any of the provisions.

7. Even after a suspension or revocation plaintiff may demand a hearing and procure reinstatement.

8. Before such hearings no one can anticipate what the final rulings of the Secretary of Agriculture will be, or what provisions will be finally decided on as reasonable, legal, and enforceable as against any person engaged in the current of interstate commerce in milk.

Under circumstances much less clear than these, Courts have repeatedly held that they will not anticipate the hearing and the final ruling of an administrative body in order to grant relief against anticipated action, the nature of which is conjectural. Courts will not presume that Governmental officials will act either unreasonably or illegally. From this proposition, there seems to be no dissent whatever. The leading cases from the Supreme Court of the United States and the other Federal Courts are as follows:

In Gilchrist v. Interborough Co., 279 U. S. 159 (1929) the Supreme Court, through Mr. Justice McReynolds, went out of its way to point out that Federal Courts must avoid even the appearance of anticipating the action of administrative officials or commissions, - even where a strong showing is made as to what the probable action of such officials will be. The case goes much further than the present situation. The owner of subway lines in New York City claimed that the existing rate was confiscatory, and filed schedules for a hearing before the Transit Commission, as provided by law (a step omitted by the plaintiff in the case at bar). It was also alleged that the members of the Transit Commission were of the opinion that no relief should be granted to the Company and that they had used threatening language indicating that action would be immediately taken against it. The original bill, asking that the Transit Commission be enjoined, was filed at 9:20 A. M. February 14th. Later the same morning the Commission denied relief, and directed action against the Company.

It will be noted that in this case the only thing left for the Commission to do was to enter an order. The subway company had complied with the provisions of the statute relating to seeking a hearing before the Commission, and actually had good reason to believe that such an application would be futile. Further than that it was only a matter of a few hours before the Commission did act as anticipated. Yet the Supreme Court took occasion to point out that even under those circumstances Federal Courts must not short circuit hearings provided by law, and anticipate the action of the administrative officials before such action becomes final. Even the appearance of such procedure must be avoided. The Court said (pp.208-209) -

> "Under the doctrine approved in Prentis v. Atlantic Coast Line, 211 U. S. 210,231, and Henderson Water Company v. Corporation Commission, 269 U. S. 278, the Interborough Company could not have resorted to a federal court without first applying to the Commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought."

The case stands out the more sharply because at the time the injunction was granted by the lower court against the Transit Commission, the Commission had already acted. It was not a mere guess what the Commission would do. In addition to that a supplemental bill had been filed by the plaintiff alleging that such action had been taken.

In the face of this case the plaintiff comes before this Court asking for injunctive relief in advance of a hearing by the Secretary of Agriculture without even making a request for a hearing, or alleging, as the plaintiffs did in the Interborough Case, that the hearing was a mere formality.

In addition to the Interborough Case, both the Supreme Court and lower federal courts have frequently and without exception held in less extreme circumstances that injunctive relief could not anticipate administrative action. Going back in chronological order these cases are as follows:

In Porter v. Investors Syndicate, 286 U. S. 462 (1931) the Supreme Court reversed a decree of the District Court enjoining enforcement of an order of the Blue Sky Law Commissioner of Montana forbidding the issuance of certificates. The order had been issued after a hearing and after the commissioner had asserted his intention to revoke plaintiff's permit. The plaintiff had not availed himself of the statutory appeal from the Commissioner to the State Court. In refusing injunctive relief the Supreme Court stated: (p.471) -

> "Under the Montana statute the administrative proceeding is not complete until the court [referring to the Montana Court] shall have acted in revision and correction of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed. We can not so read the act in the absence of clear and unambiguous phraseology requiring that course."

In Royal Baking Powder Company v. Federal Trade Commission, 32 Fed. (2d) 966 (1929) decided by the Court of Appeals of the District of Columbia, plaintiff was seeking to enjoin the Federal Trade Commission from making an order to show cause why a former order should not be vacated. The Court affirmed a denial of the injunction, on the grounds that it was an attempt to enjoin "an anticipated order which the commission may or may not make." The opinion went further and pointed out that even had the order been entered the plaintiff would have been in no better position to obtain equitable relief, concluding with the statement (p. 968) -

> "It is well settled that the right of review herein afforded by the Circuit Court of Appeals constitutes 'a plain, speedy and adequate remedy at law and is a bar to the remedy by injunction!"

In South Porto Rico Sugar Company v. Munoz, 28 Fed. (2d) 820 (1928) it was held that even where the Public Service Commission of Porto Rico had no jurisdiction to cancel a franchise, the issuance by the Commission of an order to show cause why such franchise should not be cancelled did not warrant injunctive relief because it did not follow that on appearance and argument the Commission would adhere to an erroneous view as to its jurisdiction.

In United States v. Abilene and Southern Ry. Co., 265 U. S. 274 (1924) the Court discusses the question whether even after a hearing and final order by the Interstate Commerce Commission, a Federal Court could enjoin when there still remained the possibility of applying for a rehearing. There remained in this case no further action to be taken by the Commission and there existed no stay of the order. The court pointed out (p. 282) that "in the absence of a stay, the order of a division is operative; and the filing of an application for a rehearing does not relieve the carrier from the duty of observing an order." Even under such circumstances the Court said that "the trial court would have been justified in denying equitable relief until an application had been made to the full Commission and redress had been denied by it." Had anything remained to be done by the commission before the operation of the order, the case is clear that no relief could have been granted.

In Chamber of Commerce v. Federal Trade Commission, 280 Fed. 47 (1920) plaintiff raised the constitutionality of the Federal Trade Commission Act before proceeding with a hearing by the Commission, - on the plausible theory that this would save useless expense if the Commission had no constitutional power to regulate in any way either the parties or subject matter. (In the case at bar no such separate question of the constitutional power to regulate the subject matter under the Act can be raised because the general power of Congress to regulate interstate commerce by administrative action is so clearly established.) No doubt recognizing that injunctive relief before a hearing by the Federal Trade Commission had already been decided against, (see Hurst & Son v. Federal Trade Commission, 268 Fed. 874, 1920) plaintiff attempted to review the preliminary question by a writ sounding both in certiorari and prohibition, - the two common law writs historically used to review general questions of jurisdiction. The Court however refused to permit the hearing before the Commission to be short circuited by this ingenuous device, stating its conclusion as follows:

> "The real gist of the complaint here is that it is claimed, and with plausibility, that the chief petitioner is not subject to the jurisdiction of the Federal Trade Commission; that the commission is proceeding erroneously and in excess of its powers; that the taking of the testimony before a final order can be made will be very expensive; and that a grievous burden is being inflicted upon petitioners, for which an ultimate setting aside of any order that may be made will not adequately compensate them. This is true in some degree of any order of the commission which may finally be set aside. The law does not contemplate that commissions of this nature will act arbitrarily nor without probable cause. It is,

> of course, conceivable that they may do so; but such a possibility cannot justify this court in exceeding its statutory powers and authority. To do so would be to deny to the administrative and legislative branches of the government the powers and authority which have been conferred upon them, and which have been uniformly upheld by the courts. It may be desirable that the law should provide for a preliminary review of questions of jurisdiction either by the Circuit Court of Appeals or by the District Courts; but, in the absence of such provision, we cannot assume that power.

In American Coal Mining Co. v. Special Coal and Food Commission of Indiana, 268, Fed. 563 (1920) it was held that in the absence of an actual order by the Indiana Coal Commission interfering with the plaintiff's rights, the fact that such an order might be made by the commission under a statute presented a purely theoretical question. (Appeal in this case was dismissed, 258 U. S. 632.)

In Cavanaugh v. Looney, 248 U. S. 453 (1919) a statute which was alleged to permit the unconstitutional use of the power of eminent domain could not be questioned by enjoining the condemnation proceedings on the theory that they were necessarily unconstitutional. Such questions could be raised only in the proceedings themselves.

In First National Bank of Albuquerque v. Albright, 208 U. S. 548 (1908) an attempt was made to enjoin an assessor from making a threatened re-assessment after a former assessment had been affirmed by the Territorial Board of Equalization of New Mexico. It was alleged that the re-assessment, if made, would be invalid. It was held that a Court of Equity could not prejudge illegal action on the part of the assessor.

In view of the extreme position taken by the plaintiffs in this bill there is little need to discuss the more doubtful cases of injunction against statutory action. Under what circumstances will equity enjoin a criminal prosecution? The number of conflicting cases dealing with that vast area of equitable jurisdiction and judicial discretion is almost unlimited. There is, however, no necessity of entering the confusion which exists in that field.

We will confine ourselves to distinguishing the most extreme case which we have found where the Supreme Court issued an injunction against the operation of a statute before the penalties provided by the statute actually went into effect. We refer to Pierce v. Society of Sisters, (1925) 268 U. S. 510. There the court in an extraordinary situation decided that an injunction might issue against future action under a statute before the date on which the statute became operative. The statute, however, required no hearing or administrative action before violation of the statute, (which in the case consisted of sending a child to the plaintiff's school), became a misdemeanor. The penalties provided by the act became inevitable by the mere passage of time, even though they were not to be imposed at the date of the bill. In approving an injunction in that case we believe that the Supreme Court went further in the use of this power than in any other instance we can find. The case, however, can not possibly be cited to justify an injunction in anticipation of an administrative hearing.

We have cited this case only because we thought it might be useful to have before the Court what we consider the extreme limit to which the Supreme Court of the United States has gone in approving a preliminary injunction before a statute was actually in effect. Since that case has nothing to do with the case at bar we do not consider it relevant to discuss other cases which are less extreme. The claim for equitable relief after a hearing is had, the license revoked, and a penalty about to be enforced is not before the Court.

However it might be well to point out that even in such a case the injury to the plaintiff would probably not be sufficient to warrant enjoining the orderly presentation of the legality of the proceedings in an action to enforce the penalty. Numerous cases refusing equitable relief from criminal prosecution can easily be collected.

There is a well settled doctrine that the issuance of an injunction requires a balancing of convenience and that a Court of Equity will be very reluctant to give injunctive relief in novel cases of grave public importance, particularly where constitutional issues are involved. Even if the plaintiff were now subject to a fine (which is not the case) the balance of public interest would be overwhelmingly against a Court of Equity exercising this extraordinary and drastic remedy. If an injunction were to be granted the milk distribution in Chicago might become demoralized, and all the careful work, the great expense both the Government and the parties assenting to the marketing agreement for milk would go for nothing. The effect of such an injunction on the administration of the Agricultural Adjustment Act would be to create chaos, and irreparable injury to the purposes which the act seeks to effectuate. There can be no prediction of the extent of such a disaster. The entire program for the economic recovery of the nation is at stake. Against this tremendous hazard there would be balanced only the possible liability of the plaintiff to pay a fine, provided we assume that the license has been revoked and proceedings for enforcement of the fine were about to commence. Assuming such a case were now before this court, which is the more important when weighed in the balance, - the possible disruption of a plan of relief for millions of people from an unparalleled depression, or this small, contingent, pecuniary liability of the plaintiff.

However, so far as the present case is concerned, such considerations need not be argued. The only questions which the plaintiff can now present in advance of a hearing by the Secretary are purely academic. On the propriety of a court deciding such questions we need only quote from Mr. Justice Taft in the case of White v. Johnson, 282 U. S. 367 (1931) at page 373:

> Neither this Court nor the court below is authorized to answer academic questions. The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial. We have above called attention to the provisions of the Radio Act which gives redress against arbitrary or unjust action by the Commission. We repeat that the appellant did not see fit to avail himself of the right of appeal thereby conferred, but on the con-

trary chose to violate the Commission's order and to stand on an alleged constitutional right which he says the action of the Commission infringed. It would be subversive of all established principles were courts, in litigations between parties who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law.

II

The Agricultural Adjustment Act and the license called in question in the case at Bar are constitutional, the former as an appropriate exercise of power delegated to the Congress by the Constitution and the latter as an appropriate exercise of power conferred upon the Secretary of Agriculture by the said Act.

A. Constitutional Questions Involved.

For the purpose of indicating the constitutional questions involved, the case is simple and the legal issues are clear.

Plaintiff is engaged in the business of buying milk and cream from producers in Wisconsin, of transporting the same into Illinois and there selling the same within the Chicago Metropolitan area (as defined in the license). The Secretary of Agriculture, by the terms and conditions of the license, has regulated the prices at which the plaintiff buys and sells.

What are the objections? Stating them first without regard to their constitutional classification, the objections made in the Bill converge upon the power to fix prices of milk and cream. That is the head and front of the attack, and it presents the essential question in this case, namely, Has the Government of the United States the power, in the circumstances disclosed in this case, to regulate the price of milk and cream bought and sold within the current of interstate commerce?

The several constitutional aspects are suggested in the Bill. Paragraph 10 contains various and sundry allegations of invalidity, all aimed at the Act itself, whereas paragraphs 11 and 12 contain others aimed at the license issued under the Act. As to the Act itself and with regard to the essential question above, the several allegations in paragraph 10 may be grouped under three main heads:

1. That the Act is not within the powers delegated to the Congress. (We assume that the commerce clause is at least included, though it is not expressly mentioned.)

2. That the Act violates the due process clause of the Fifth Amendment.

3. That the Act unconstitutionally delegates legislative power to the Secretary of Agriculture.

As to the license, the allegations raise (with an exception which we do not deem important here) substantially the same questions. But we respectfully suggest that these allegations raise, first of all, certain statutory questions which must be disposed of before the constitutional questions become necessarily involved. So, the initial inquiry is: Are the prices fixed in accord with the statutory mandate? If so, then the validity of the statute authorizing the prices to be fixed is in issue, and the three questions stated above are before the Court. If not, the case goes off on the question of excess of statutory power. Compare, e. g., the invalidity of rate orders of the Interstate Commerce Commission and the continued integrity of the rate fixing power delegated to the Commission. The power delegated to the Secretary in respect of prescribing practices and charges is to see to it that they are fair. Hence, an attack upon the fairness of the prices fixed is a challenge of the correctness of administrative action under the Act. This matter should first be taken up with the administrative body itself - which reenforces our point in Section 1 above that the present action is prematurely brought.

Should the Court conclude, as did Mr. Justice Cox in the Southport Petroleum Case, infra, to consider constitutional questions we submit the following matters (in addition to the facts disclosed by the pleadings and further facts open to judicial notice) for consideration by the Court in support of the Government's position.

B. An Acurate Emergency to be Dealt With.

We do not contend that there is an "emergency" power. We recognize that the Constitution is operative in time of war as well as of peace, Ex parte Milligan (1867) 4 Wall. 2, in emergencies as well as in normal periods. But we know that an acute fact situation, call it emergency or what you will, may justify governmental action otherwise not permissible. If proof were needed it is abundant in the cases. Wilson v. New (1917) 243 U. S. 332, sustaining the Adamson Act relating to hours and wages of railroad employees, passed to meet the situation created by the threatened strike in 1916; Block v. Hirsh (1921) 256 U. S. 135, sustaining the housing laws passed by Congress to deal with the shortage of housing following the war. These cases were concerned with the elastic character of due process of law to conform to changing conditions. We submit that similar considerations are relevant in dealing with the commerce clause. That which is not a burden upon or does not prejudicially affect interstate commerce in ordinary times may become a burden or may prejudicially affect it in a period of emergency.

When the emergency is great and widespread the courts have shown a definite disinclination to interfere with the executive efforts in carrying out the legislative policies for correction of the evil conditions. This is aptly illustrated in the recent opinion in this Court by Mr. Justice Cox in Southport Petroleum Co. v. Ickes, (Equity No. 56024, Supreme Court of the District of Columbia). In refusing to enjoin Secretary Ickes from exercising powers derived from the President under the National Industrial Recovery Act, Mr. Justice Cox declared that "necessity confers many rights and privileges which otherwise would not exist" and added that while of course the Constitution is not set aside in such circumstances, yet its construction must be in the light of and to some extent subject to the primal and fundamental concept of the necessity for self preservation. Mr. Justice Cox

forcefully pointed out that where, after a legislative declaration of the national emergency, Congress conferred authority upon the Executive to meet the crisis, "every presumption is in favor of the validity of the authority so granted . . . . . The Court will not lightly exercise its power in any way to complicate the problem of the Legislative and Executive Departments in the present emergency."

C. The Commerce Clause is not Exceeded.

The transactions here are indisputably within the current of interstate commerce. Purchase for transportation in interstate commerce is within the current of commerce:

Dahnke-Walker Co. v. Bondurant (1921) 257 U. S. 282
Lemke v. Farmers Grain Co. (1922) 258 U. S. 50
Shafer v. Farmers Grain Co. (1925) 268 U. S. 189
Weeks v. U. S. (1918) 245 U. S. 628

So is sale (certainly the first sale) after the interstate transportation is ended:

Brown v. Maryland ( ) 12 Wheaton 419
Leisy v. Hardin (1890) 135 U. S. 100
McDermott v. Wisconsin (1913) 228 U. S. 115
Penna Gas Co. v. Public Svc. Com. (1920) 252 U. S. 23

Purchase and sale are thus components of the interstate transaction itself. More than that - a point likely to be overlooked and one which we call attention to as of special importance in the present case - these interstate features, purchase and sale, were held, in most of the cases just cited, to be interstate commerce of national character, within the rule announced in Cooley v. Board of Wardens (1852) 12 Howard 298, and beyond the regulatory power of the States. But it cannot be assumed that such features are to go unregulated, nor can it be conceded that they are to be given immunity from all governmental control. Being parts of the interstate transaction, they are subject to the power of Congress; and regulation of the price involved in such purchase and sale is a regulation of interstate commerce. There can be no further controversy about the commerce clause, and the next question is, is the regulation consistent with due process of law?

But before leaving the commerce clause and taking up the due process question, it may be just as well to suggest that we do not deem our present case to be endangered, but on the contrary deem it to be actually supported, by Hammer v. Dagenhart (1918) 247 U. S. 251, the familiar child labor decision. It will be recalled that the majority in that case took a distinction between the use of the power of Congress to promote the welfare of people in the State of destination as against those in the State of origin of the interstate transaction, and held that the Child Labor Act was void as being aimed at conditions in the State of origin. Here, however, the State of destination as well as the State of origin will share in the benefits of the Agricultural Adjustment Act; for it is one of the purposes of that Act and among the anticipated results of its administration to maintain, control, and protect the current of commerce in milk and its products.

If a distinction between the Child Labor Case and the case at Bar were necessary, it exists on the facts. In that case, control was exerted over the manufacture of goods within a State; in this case, over the marketing of agricultural commodities in interstate commerce. There, it was the employment of children, a matter remotely related at best to interstate commerce; here, it is the purchase of milk, purchase being a component of the interstate transaction itself. There, the State could protect itself, manufacture being antecedent to and outside the current of commerce; here, a State cannot of right protect itself, sale for shipment outside the State being within the current of commerce and national in character, as suggested above. There, the interstate gates were closed in order to back up the goods on the manufacturer and thus bring him around to a specified course of conduct; here, the gates are kept open and a plan is set up designed to maintain and stabilize the interstate business.

D. The Due Process Clause is not Violated.

It is the Government's contention that the interstate marketing of milk and cream is affected with a national public interest and that the regulation of prices therein does not violate the due process clause of the Fifth Amendment.

The law on the subject of control of prices may be found in a long line of familiar cases beginning with Munn v. Illinois (1877) 94 U. S. 113, and running through German Alliance Ins. Co. v. Kansas (1914) 233 U. S. 389, Block v. Hirsh (1921) 256 U. S. 135, Wolff v. Industrial Court (1923) 262 U. S. 522, Tyson v. Banton (1927) 273 U. S. 418, Ribnik v. McBride (1928) 277 U. S. 350, Williams v. Standard Oil Co. (1928) 278 U. S. 235, Tagg Bros v. U.S. (1930) 280 U. S. 420, New State Ice Co. v. Liebman (1932) 285 U. S. 262. The difficulty comes in determining the question (which is essentially one of fact) whether a given business or part thereof is so "affected with a public interest" as to justify the fixing of prices therein. The answer comes from an informed judgment on social needs.

The Supreme Court has said that "a declaration by a legislature concerning public conditions that by necessity and duty it must know", while not conclusive on the courts, is "entitled at least to great respect", Block v. Hirsh, at p. 154; that "if a state of facts could exist that would justify" the legislation, "we must assume * * * it actually did exist when the statute * * * was passed, "Munn v. Illinois, at p. 132; and, more significantly still, that in cases where "underlying questions of fact may condition the constitutionality of legislation," the presumption of constitutionality "must prevail in the absence of some factual foundation of record for overthrowing the statute," O'Gorman and Young v. Hartford Fire Ins. Co. (1931) 282 U. S. 251, 257.

The O'Gorman Case just cited is a particularly important one in its bearing upon the method of judicial disposition of certain constitutional questions. The case involved the validity of a New Jersey law regulating the commissions of fire insurance agents. In sustaining the statute because no adequate showing had been made against it, the Court delivered an opinion which endows the oft-recognized presumption of constitutionality with weight

and substance, puts definitely upon the challenger of a statute the burden of making a record to show its invalidity, and gives the supporters of the statute the procedural advantage of waiting until such a record has been made, or until such facts are suggested of which judicial notice must be taken, as will establish the unconstitutionality of the statute in question.

The Government would draw attention to the following matters bearing on the factual situation. First is the finding and declaration by Congress, in the opening words of the Act, that there is a "present acute economic emergency," that the emergency is "in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities," and that this disparity "has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure." Furthermore, it is declared that "these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment" of the statute whose overturn is now sought to be accomplished in the case at Bar.

More particularly, the facts which show the compelling need for this legislation and the appropriateness of the plan of administration to effectuate the purposes of the Congress are set forth in the main affidavit filed in this case. See Paragraphs III to VII, inclusive, and the economic affidavit.

We might well rest the due process argument on a decision of the Court of Appeals of New York, just a month ago, sustaining the recently enacted milk control law of that State. Upon the basis of a report by a special legislative committee and in accord with its findings and recommendations, the Legislature declared that the milk business is one affecting the public health and interest, and created a Milk Control Board with directions to fix minimum wholesale and retail prices and with authority to fix maximum prices. A test case was brought on the conviction of one Nebbia for selling milk at retail at a price below that fixed by the Board, and the conviction was affirmed. Nebbia v. New York, decided on July 11, 1933, not yet officially reported.

It will be noted that the precise issue in that case is one of the issues in the case at bar, namely, the power to fix a minimum price for milk. In sustaining the power, Pound, Ch. J., speaking for the Court (O'Brien, J., dissenting) wrote a comprehensive opinion in which he put great emphasis upon the weight and significance of the legislative findings as to conditions prevailing in the milk industry. The opinion itself is a striking demonstration of the importance of facts in cases of this character. Indeed, large parts of the opinion are given over to the findings and conclusions of the investigating committee. These findings are so nearly parallel to those made by the Congress and the Agricultural Adjustment Administration as to conditions generally in the milk industry that we reproduce here a part of the opinion in which these findings are quoted:

"Among the causes of low milk prices mentioned in this preliminary report were the following: "Unsettled market conditions have led to price wars among distributors which have caused reductions in retail and wholesale prices below the point justified by the supply-and-demand situation. Unfair and destructive trade practices have been more prevalent and more serious than usual in their effect upon the price structure.

DESTRUCTIVE COMPETITION

"It also found: 'The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributor can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors can not do this, since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended returns by the larger organizations, are in a position to undersell the larger distributors in the cities.

'Most of the surplus in the New York milk shed is carried by the Dairymen's League and the Sheffield Farms Company. Other dealers by selling all or nearly all their supply as fluid milk have been able to engage very generally in price cutting, which has repeatedly forced the large retail distributors (Borden's and Sheffield Farms) to lower their prices so as to protect their business. Some means of control is urgently needed which will place all buyers of milk on an equal basis as to the cost of their milk which they purchase for sale in fluid form. Only in this way can prices be stabilized above the ruinous level of returns from butter and cheese, or the public be assured that the most efficient methods of distribution will prevail.'

CONCLUSION OF REPORT

"In one of the final conclusions of this preliminary report the committee found: 'It is clear that the economic law of supply and demand cannot be relied upon either to insure the consumers of a continuous and adequate supply of pure and wholesome milk, or to prevent grave injury to this important industry and its possible disintegration.'

"It found as a remedy that a board should have authority 'to fix the prices to be paid by dealers for milk classified according to its use with proper differentials, and the retail and wholesale prices to be charged for fluid milk and cream.'

"The condition has given rise to scenes of violence and disorder in the attempt to organize so-called milk strikes as a protest against the low prices paid for milk. The result was the enactment of the law now under consideration. Concededly the Legislature cannot decide the question of emergency and regulation, free from judicial review, but this court should consider only the legitimacy of the conclusions drawn from the facts found."

In thus accepting the legislative findings as worthy of so much reliance the Court of Appeals of New York is quite in harmony with what the Supreme Court of the United States has done, notably in Chicago Board of Trade v. Olsen (1923) 262 U. S. 1, in regard to congressional findings.

As to cases, the Court refers to most of those cited above. But all these decisions suggests the Court, "are to be read in the light of surrounding circumstances." "Doubtless distinctions may be drawn, holdings to the contrary cited and false analogies pointed out . . . . Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority." Concluding, the Court declares:

"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract (Matter of Jacobs, 98 N. Y. 98; Lochner v. New York, 198 U. S. 45); with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view * * * and that mere novelty is no objection to legislation (People ex rel. Durham Realty Corp. v. LaFetra, 230 N. Y. 429)."

In developing and applying such views, the Court does not confine itself to case material in the official reports but relies upon and cites discussions of the subject in legal periodicals -- e.g., Manley, "Milk as a Public Utility," 18 Cornell Law Quarterly 410, Cross, "Milk Control Law," N. Y. State Bar Ass'n. Bulletin, May, 1933; "Legislative Regulation of the N. Y. Dairy Industry," 42 Yale Law Journal 1259; Hamilton, "Affectation with Public Interest," 39 Yale Law Journal 1089.

The Court also emphasized the outstanding importance of the milk industry to the consuming public, the agricultural industry and the public at large. It pointed out the problem of the surplus and the various matters of grave concern in connection with the industry generally. All of these conditions are typical of the national industry, as described in the affidavits filed herewith, and emphasize the necessity for national regulation and its constitutional validity.

E. There is no unconstitutional delegation of legislative power.

In issuing licenses the Secretary is authorized to prescribe "such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges (italics ours) that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such (agricultural) commodities or products and the financing thereof." Section 8(3). Having set this basic standard in the Act, Congress then authorized the Secretary, "with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him." Section 10(c).

This is just another example of what has long since become familiar in the administration of law, namely, authorization to work out the details for applying the general statutory standard to specific conditions. In this respect Congress not only is following the lead of what has been done many times before but also is providing the most effective, perhaps the only, administrative method by which the objectives of the Act can be attained.

As a matter of fact, the standard set in this Act is probably more specific, more nearly susceptible of exact ascertainment, than those in other statutes to which we presently will refer. The reason for this is that there is one clear objective never lost sight of in this Act and in its administration. Shortly stated, this objective is to secure parity prices for farm products. More broadly stated, and in the language of the declaration of policy in Section 2, it is to "reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." In the case of milk, the base period, as fixed by the Act, is August 1909-July 1914.

As against "unfair practices or charges" in the present Act, compare:

"Just and reasonable charges," (Interstate Commerce Act, Sec. 1, par. (5) Title 49, U. S. C.);

"Unfair methods of competition," (Federal Trade Commission Act, Sec. 45, Title 15, U. S. C.);

"Unfair, unjustly discriminatory, or deceptive practice or device," (Packers and Stockyards Act, Sec. 192, Title 7, U. S. C.).

The long experience of the United States in carrying out its functions in this administrative way, the practical necessity for so doing, and the unbroken judicial approval of the method, are reflected in a line of cases only the most recent of which we deem it necessary now to cite. This is the case of Hampton v. United States (1928) 276 U. S. 394 (sustaining the flexible provisions of the Tariff Act of 1922), and we quote one sentence from the opinion by Chief Justice Taft, speaking for a unanimous Court:

> "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations." Citing cases (p.406).

In conclusion it is respectfully submitted:

1. The plaintiff, because he has not only failed to exhaust but has completely ignored the plain and adequate administrative remedies provided for him, has no right to demand the exercise of the extraordinary powers of a Court of Equity.

2. Should the Court, -- bearing in mind the long line of judicial holdings establishing and reiterating the presumption in favor of the constitutionality of important acts of Congress, and the unwisdom of entertaining constitutional objections in a case of great importance to the nation on a premature motion for temporary injunction, -- deem it wise to comment on the constitutional issues, there can be no other conclusion than that the Agricultural Adjustment Act and the license issued thereunder are constitutional. It appears:

First, the power of the Congress to regulate interstate commerce in milk is not subject to question.

Second, there has been no improper delegation of legislative powers.

Third, the statute and regulations are in accord with the due process of law clause. Nothing new is involved in the control of prices of vital necessities. The rule of law is altogether clear that such control may be exerted if there is public necessity for it. Such a necessity is established in this case by the findings of the Congress and by the findings of the Agricultural Adjustment Administration. Those findings are entitled to great respect and must be taken as conclusive unless the contrary can be clearly shown. Every presumption favors their correctness, as well as the correctness of the administration of the Act.

And, finally, in view of the tremendous importance of the Milk Industry to Agriculture, the complete dependence of the public on the healthful and efficient distribution of milk, and the peculiar evils to which that industry is subject, the due process clause should not now be utilized to obstruct the program for the preservation of that industry and hamper the economic recovery of the Nation.

Respectfully submitted,

HAROLD M. STEPHENS,
Assistant Attorney General,

JAMES LAWRENCE FLY,
Special Assistant to the
Attorney General,

Attorneys for Defendant.

JEROME FRANK,
General Counsel,

THURMAN ARNOLD,
NOEL T. DOWLING,
Special Assistants to the
General Counsel,

Agricultural Adjustment Administration,

Of Counsel.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Milton R. Beck, In care of Dodds & Burkinshaw, Shoreham Building, Washington, D. C. Plaintiff,	)	In Equity
v.	)	No. 56059
Henry A. Wallace, The Secretary of Agriculture, Washington, D. C. Defendant.	)	

MEMORANDUM BRIEF FOR THE DEFENDANT IN OPPOSITION TO THE RULE TO SHOW CAUSE

This case, with a single difference raises the same questions and is open to the same objections on the part of the defendant as the companion case, Economy Dairy Company, Incorporated v. Wallace (Equity No. 56058); and, notwithstanding such difference, we submit that it should be decided in the same way as that case.

The difference is that the plaintiff here alleges, first, that he is engaged in the business of buying and selling milk and cream solely in intrastate commerce (paragraph 3) and, second, that Congress has no power to authorize the Secretary of Agriculture to regulate the price of milk and cream bought and sold in such commerce. (Paragraph 10.)

With this difference, the present case presents a constitutional question not involved in the companion case above referred to, and the question is: In the light of the marketing conditions found to exist in the Chicago Metropolitan Area, may the Secretary of Agriculture, under the Agricultural Adjustment Act, apply the license with its price-controlling terms and conditions to distributors engaged in buying and selling milk and cream wholly within the State of Illinois?

The answer to that depends, as was suggested in Southern Railway Co. v. United States (1911) 222 U. S. 20, when a similar question was before the Supreme Court, upon the answer to another question about the relationship between the two classes of business. Upon appropriate findings that, by reason of the inter-relationship or intermingling of intra- and interstate commerce or by reason of the prejudicial effect of the intra- on interstate commerce, it is necessary to control the intra- in order effectively to control the interstate commerce, then the federal power may extend to the intrastate commerce. And as appears from the

license itself, the Secretary has made such appropriate findings to cover the business done in the Chicago Metropolitan Area by the plaintiff. The findings are as follows:

> "The Secretary finds that the marketing of milk for distribution as fluid milk in the Chicago metropolitan area and the distribution of said fluid milk affects and enters into both the current of interstate commerce and the current of intrastate commerce which are inextricably intermingled;"
>
> "The Secretary finds that practices and charges contrary to the several provisions of said agreement [into which the Secretary had entered, as authorized by s 8 (2) of the Act] would constitute unfair practices and charges that would prevent or tend to prevent the effectuation of the declared policy of the act with respect to milk and its products and the restoration of normal economic conditions in the marketing of milk or its products and the financing thereof, and finds that licenses should be issued *** to eliminate such practices and charges."

It is long since past the time to contend that the mere fact that a given phase of commerce is intrastate establishes ipso facto that it is beyond the power of Congress. It is common knowledge that, with business being done more and more on a national scale, the coverage of the commerce clause has gradually been expanded. The foundation therefor was laid by Chief Justice Marshall in Gibbons v. Ogden (1824) 9 Wheaton 1, in language which, while not quoted so often as other parts of his opinion, is of great significance in the development of federal power. In discussing the power of Congress he attempted to indicate something of the extent to which it could go by suggesting what it could not reach. This is the way he put it: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general power of the government." To state the affirmative implications of such language: it is permissible for Congress to regulate the internal concerns of a State if they affect other States and if it is necessary to interfere with them for the purpose of executing some of the general powers of the Nation. Effect upon other States and administrative necessity thus become two factors for determining whether Congress may reach out in a given situation normally considered to be intrastate. That is to say, the announced doctrine even as early as Marshall's day was that the power of Congress is not restricted to interstate commerce and that the extent to which it may reach intrastate commerce is deposited upon considerations of fact.

Certain it is that on the basis of such doctrine a vast expansion of federal power has taken place under the commerce clause. Back of it all is the acknowledged power in Congress "to foster, protect, control and restrain" where interstate or foreign commerce is concerned. Second Employer's Liability Cases (1912) 223 U. S. 1. Cases illustrating such expansion have been frequent in occurrence. They have arisen under the Anti-Trust laws, the Interstate Commerce Act, and other statutes. They have covered a wide range. Aside from factual differences, however, all of them stand together on a common ground, namely, that they are concerned with the development and expansion of the auxiliary power of Congress to reach as far into intrastate as may be necessary effectually to foster and protect the interstate. We cite, without discussion, some of the significant cases with their suggestive opinions:

In re Debs (1895) 158 U. S. 564.
Addyston Pipe & Steel Co. v. U. S. (1899) 208 U. S. 274.
Swift v. U. S. (1905) 196 U. S. 375.
Stafford v. Wallace (1922) 253 U. S. 495.
Board of Trade v. Olsen (1923) 262 U. S. 1.
U. S. v. Ferger (1919) 250 U. S. 199,
Southern R. Co. v. U. S. (1911) 222 U. S. 20.
Houston etc. Ry. v. U. S. (1914) 234 U. S. 342
Railroad Com. v. C. B. & Q. R. Co. (1922) 257 U. S. 563.

That the Congress has power to reach and control intrastate commerce whenever such control is necessary to the effective exercise of its power over interstate commerce is no longer open for debate. The question to be decided in a given case, as the Supreme Court has stated in Florida v. United States (1931) 282 U. S. 194, is as to the "propriety of the exertion" of the power; and this is mainly a question of fact. This question has been the subject of investigation and consideration by the Secretary of Agriculture, in pursuance of the powers vested in him by the Act, and pertinent findings have been made thereon.

Considering what the Government is endeavoring to do, the exigency in which it has acted, and the admitted need for unified and centralized control, it might well be said in this case, as the Government did say in presenting the case for the Packers and Stockyards Act in Stafford v. Wallace (1922) 258 U. S. 495:

> "Congress having legislated on a vast and vital subject and all its ramifications as an entirety, the judicial review should go on lines no less extensive. *** The present case is not one to be examined *** through the small end of a telescope."

We submit, therefore, that the decision in this case should be controlled by the decision in the companion case of Economy Dairy Company, Incorporated, v. Wallace, (Equity No. 56058).

Respectfully submitted,

HAROLD M. STEPHENS,
Assistant Attorney General,

JAMES LAWRENCE FLY,
Special Assistant to the
Attorney General.

Attorneys for Defendant.

JEROME FRANK,
General Counsel,

THURMAN ARNOLD,

NOEL T. DOWLING,
Special Assistants to the
General Counsel,

Agricultural Adjustment Administration,

Of Counsel.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy Company, Incorporated,	)	
	)	
Plaintiff,	)	
	)	In Equity
v.	)	No. 56058
	)	
Henry A. Wallace,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS THE BILL OF COMPLAINT

Comes now the defendant and moves to dismiss the bill of complaint herein on the grounds that:

1. The bill fails to state a cause of action.

2. The bill fails for want of equity, and the statute and license before the Court are valid.

3. The bill is untimely and premature, and fails to show an exhaustion of plaintiff's administrative remedies.

Respectfully submitted,

JAMES LAWRENCE FLY,
Special Assistant to the Attorney General.

August 28, 1933.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Milton R. Beck, Plaintiff,	)	
v.	)	In Equity No. 56059
Henry A. Wallace, Defendant.	)	

DEFENDANT'S MOTION TO DISMISS THE BILL OF COMPLAINT

Comes now the defendant and moves to dismiss the bill of complaint herein on the grounds that:

1. The bill fails to state a cause of action.

2. The bill fails for want of equity, and the statute and license before the Court are valid.

3. The bill is untimely and premature, and fails to show an exhaustion of plaintiff's administrative remedies.

Respectfully submitted,

JAMES LAWRENCE FLY,
Special Assistant to the Attorney General

August 28, 1933.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy Company, Incorporated, Plaintiff,	)	
v.	)	In Equity No. 56058
Henry A. Wallace, Defendant.	)	

DEFENDANT'S AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR A TEMPORARY INJUNCTION AND IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE BILL.

DISTRICT OF COLUMBIA, SS:

James Lawrence Fly, being duly sworn, says:

I am a Special Assistant to the Attorney General and have been continuously charged with the conduct of this litigation since its inception; in the course of preparation of this case I have made investigation and inquiry as to the facts stated in this affidavit, and they are true to the best of my knowledge and belief.

I.

Prematurity of this Suit

1. Plaintiff has no reasonable ground for the alleged information, as stated in Paragraph 14 of the bill, to the effect that defendant is attempting through enforcement of the statute and the regulations, restrictions, and rules thereunder to force, or that defendant entertains any purpose or intent thus to force, plaintiff to give up and abandon his business. Defendant can take no such action without a lawful hearing after due notice and cannot now determine and has made no endeavor to determine what his decision after any such hearing may be.

2. Plaintiff has no reasonable ground for the allegation in Paragraph 15 of the bill that defendant is assuming to revoke plaintiff's license

or that he has any purpose or intent or that he has made any threat whatsoever in connection therewith. All that defendant is able to do, (and defendant has not entertained any plan, purpose, intent, or made any threat even in connection therewith), is to institute a hearing after due notice and in a lawful manner consider the question of the suspension or revocation of plaintiff's said license.

3. Defendant has no purpose, intent, or plan, and defendant has made no threat to instigate criminal prosecutions of the plaintiff. Defendant has no authority whatsoever in connection with the institution of criminal prosecutions.

4. The allegation that plaintiff will be wrongfully and by duress or coercion forced to take certain action, as set forth in Paragraph 16, is without foundation.

5. Plaintiff has a full, complete and adequate remedy at law.

6. It appears from the statute itself, Section 8 Subsection 3 thereof, that no regulation may be enforced or license suspended or revoked without due notice and opportunity for a hearing, which hearing has never been initiated by the defendant nor requested by the plaintiff. It further appears on the face of the license itself, Appendix II thereof, Section 203, set out in Exhibit A of the complaint that:

> "The procedure for suspension or revocation proceedings shall be in accordance with General Regulations, Agricultural Adjustment Administration, Series 3."

At the time the license was issued the Secretary of Agriculture had not perfected these and other regulations, as the plaintiff well knew, and this provision was inserted in the license to inform all concerned that such regulations would appear.

7. The Secretary of Agriculture has interpreted the Act to mean that any person affected by the terms of any license has the right to demand a hearing for the purpose of securing modification of any of its terms and conditions, or a ruling as to the applicability of the license with regard to himself. General Regulations, Series 3, referred to in the license, were placed in effect on August 26th, 1933. Section 300 thereof reads as follows:

> "If any person licensed under the Act considers himself aggrieved by any term or condition of such license, or by the operation or effect thereof upon his business, such person may file with the Secretary a written application for modification thereof, setting forth the grounds therefor, and thereafter, the Secretary shall, when it appears to the Secretary from the face of the complaint that it is not without merit, give due notice to all interested parties and set the complaint down for a hearing before the Secretary, or such officer or employee of the Department as he may designate for the purpose, and the Secretary shall take such lawful action thereon as he deems necessary to carry out the provisions of the Act. The

Secretary, with or without complaint, may institute appropriate proceedings to consider the question of modification of any license, or consider the same in any proceeding for revocation or suspension thereof."

8. Also as part of said General Regulations the following provision was placed in effect as Section 218:

"After a license has been suspended or revoked by the Secretary with respect to any person, such person may make application in writing to the Secretary for reinstatement under the license. If it appears to the Secretary that the violation of the license was not willful or in bad faith, the Secretary shall reinstate such applicant as a licensee under the license upon a showing satisfactory to the Secretary that the applicant is able and willing in good faith to comply with the terms and conditions of the license. If it appears to the Secretary that the violation was willful or in bad faith, the Secretary shall reinstate the applicant as a licensee under the license upon a showing satisfactory to the Secretary that the applicant is able and willing in good faith to comply with the terms and conditions of the license and upon the furnishing of a bond, in such form and in such penalty as the Secretary may determine, conditioned upon the applicant's future compliance with the terms and conditions of the license. Nothing in this regulation shall be construed to exempt any person from fines or penalties incurred by reason of being engaged in handling without the license required by the Secretary any agricultural commodity or product thereof, or any competing commodity or product thereof in the current of interstate or foreign commerce."

9. The effect of the statute, license, and regulations on the rights of the plaintiff and all licensees is as follows:

(a) Any person affected by a license may make application for a modification of any of its terms or conditions to which he objects, and the Secretary will grant him a hearing thereon and make the requested modification if his objections are well taken.

(b) At such hearing any person affected may raise the question of the legality of the entire license, or any part thereof, or may show that it is not properly applicable to him because he is not within its scope.

(c) No action to revoke or suspend a license can be taken without a hearing initiated by the Secretary of Agriculture after due notice to the person affected. At such hearing, in addition to the question of whether he has violated such license, the person affected may ask for modification of any of its terms or conditions, or may raise the issue of the legality of the entire license or any part thereof.

(d) Even after the revocation or suspension of a license, plaintiff may demand a hearing and procure its reinstatement.

10. Finally the proper respect which the plaintiff knows this Court to entertain for a coordinate branch of the government should prevent the plaintiff from claiming before this Court in advance of a decision by the Secretary of Agriculture after a hearing, that the Secretary has prejudged the case and is going to act illegally or unreasonably. Should the Secretary do so, under the statute his action is rendered void.

11. The defendant, engaged in an emergency task of great importance to the nation, is endeavoring to build up appropriate administrative machinery and to formulate the rules of procedure necessary to the efficient functioning of an orderly system, all designed to accomplish the vastly important purposes of the Agricultural Adjustment Act. The task is of vital national importance. It is purposed that the Act will be administered fairly and with due regard to constitutional and legal rights. If the parties concerned are successful in casting the great burden of the many questions arising under the Act on to the shoulders of the courts without a reasonable exhaustion of their administrative remedies, and in anticipation of illegal action on the part of the administration, utter confusion will result, and the orderly proceedings in the Department of Agriculture and the hearings before the Secretary will be treated as a nullity, and the machinery of the emergency recovery program, designed to overcome the long continued, grave, economic crisis, will be seriously impaired.

II

Lack of Equity of the Bill

12. It appears upon the face of the bill of complaint that the Act of May 12, 1933, known as the Agricultural Adjustment Act, and the License for Milk - Chicago Milk Shed, issued pursuant to said Act of Congress, and all of the proceedings leading thereto are in conformity to the Constitution of the United States and its laws and in effectuation of the policies thereof, and the bill of complaint fails to state a cause of action.

III

Facts Showing the Peculiar Necessity for Regulations in the Current of the Interstate Commerce of the Milk Industry, and the Reasonableness of the Regulations.

13. The production and distribution of milk is one of the most important industries in the United States. In amount of income the dairy industry is by far the most important of the Agricultural industries. In 1932 its products were valued at $1,260,000,000 as compared to a total value of all farm products of $5,143,000,000. They are four times as valuable as all the grain products and far more valuable than all the grains, cotton, and tobacco combined. The several vital phases of this business, and their relation to the public welfare mark the industry as peculiarly affected with a strong public interest.

14. Milk is a necessity to the consuming public - perhaps in a greater degree than any other commodity. The consuming public is highly depend-

ent upon the dairy industry in this country for the continuous and uninterrupted flow of an ample supply of pure milk. The health of the citizens and the vitality of the race demand this, and make it obligatory upon the government to use all reasonable means to assure it.

15. The statute is aimed to relieve serious burdens on interstate commerce resulting from the weakened condition of the agricultural industries generally. It, of course, is not proposed to regulate only the milk industry. The government has already spent many millions of dollars on cotton, wheat, hogs, and tobacco. The other basic industries are now being studied and it is expected that through the cooperation of the great majority of all those concerned, substantial benefits will accrue to the industries and to the country through the improvement of its commerce and its national credit structure. Regulation of the Chicago Milk Industry is only a small part of the plan to regulate this important industry throughout the country. It is purposed that improvements brought about in this industry will be consistently extended to it in all portions of the country. The regulation of the Chicago Milk Industry is the first of its character, and the Secretary of Agriculture is by no means prepared to state that all of the regulations are final or irrevocable. It is desired to state, however, that the present regulation of the Chicago Milk Industry, which was instituted there at an early date primarily because of the chaotic conditions which were ruining it, is the first test of a great and important plan. The challenge which plaintiffs make to the integrity of the system as thus applied in this particular situation is a challenge to the integrity of the entire system. This suggests a strong public interest in leaving the appropriate government department unhampered in its endeavors to successfully and fairly carry out the legislative policies.

IV.

Necessity for Regulation of Interstate Commerce in Order to Assure a Continuous Supply of Pure Milk in Large Metropolitan Area.

16. The distribution of milk in large cities is peculiarly susceptible to interruption on account of labor troubles, unfair practices, and ruinous competition because even a momentary tie-up is serious. It is necessary to establish large permanent organizations which can bring milk through in spite of storms, or the ordinary hazards which might cause a temporary break-down in any other business without such serious consequences. If such large organizations are not curbed by regulation, the consuming public is at their mercy in the matter of price and delivery. If they are not protected against ruinous competition they become unable to render good service to the public, and tend to neglect safeguards of health which are expensive but indispensable to public safety. This can only be accomplished by regulation. Where a metropolitan community is situated, as the City of Chicago, where its milk supply comes from several states, there is no possibility of uniform regulation unless the interstate commerce power is invoked. One source of supply in one state can not be effectively regulated if by doing so it becomes impossible for that supply to compete with the supply from other states to the same consumers, which may be subject to less stringent regulations, or to no regulation at all.

17. The disorder which accompanies an unregulated production and distribution of milk, strikes of milk wagon drivers, and rackets of gangsters who take advantage of the fact that milk distribution must not be interrupted, is a fact of such general knowledge as to be within the judicial notice of this Court. The menace to public health which may be caused by an inefficient distribution of milk is also a matter of general knowledge.

18. The problem of strikes is another matter of grave concern in the milk industry. These frequently entail forms of physical violence, including the obstruction and destruction and contamination of milk and dairy products in the course of interstate transportation. Milk strikes and milk famines have from time to time prevailed in various sections of the country, and at any time when the dairy industry in general, and that part of the industry in the vicinity of Chicago, in particular, is in a state of unrest, strikes and their attendant evils are likely to follow. At this moment strikes are being threatened, while at the same time the government and those many distributors cooperating with it are planning to raise prices to the farmer. Disorganization and unfair competition threaten to prevent this action. Amongst the results of situations of this kind is the prevention of the flow of milk into the crowded cities, the exhaustion of the supply there available, the breakdown of health regulations, and the inability of the producers to get the milk to the market.

V.

The Necessity of Protecting the Producing Farmer, and the Avenues of Distribution.

19. A large portion of the agricultural population of this country is dependent upon the milk business for its livelihood. It is of grave concern that the farmer producers of dairy products shall be assured of a steady outlet for the products of their labors. It is essential that the farmer producers be assured that they will be paid for their products and that the prices will be adequate to enable the farmer to achieve a standard of living above that of a submerged peasantry. Virtually every danger incident to the distribution of milk applies not only to the consuming public in general but to the farmers, who provide for and are dependent upon this industry.

20. Between the farmer and the consumer is a considerable phase of the industry which is engaged in the collection, purification, and the distribution of pure milk products. This class again warrants serious consideration of the government because of its own importance. But, further, it is of grave importance that any unfair practice which tends to demoralize the business of distributing pure milk and which tends to make that business incapable of self support, tends to break down the continuous and uninterrupted supply of pure milk to the consuming public, striking at the very vitals of the national welfare, and at the same time striking at the welfare of the farmers who are dependent upon and who in turn support the industry. Ruthless competition on the part of a recalcitrant minority will inevitably tend to demoralize the entire industry, break down its orderly methods of production and distribution, and at the same time reduce the demand for the farmer's product and his supply available to the public. Where ruthless competition and illegal and unfair trade practices are based upon and are supported by the avoidance of the proper standards for the public health, the havoc wrought can only be more serious. The long range

economic result of a glutted market and illegal and unfair competition is an inevitable tendency to break down the industry and bring on all the evils of uncontrolled monopoly.

21. In addition to the problem of continuous supply to the consumer and the continuous demand, in season and out, on the farmer, and the creation and enforcement of a system of fair trade practices and of healthful standards, there is another matter of grave concern, and that is the surplus production. The great majority of the responsible companies engaged in the distribution of milk have fulfilled the social obligation of disposing of the surplus production which would otherwise place the farming industry in a ruinous condition. In general the farmers are members of organizations, cooperative in nature, such as the Dairymen's League and the Pure Milk Association of Chicago, sanctioned by laws of the states and of Congress, which undertake to dispose of their entire product. The distributors, on the other hand, undertake to purchase the entire output and to pay therefor in accordance with the relative amounts sold as fluid milk and for creamery purposes respectively. Class 1 milk is that sold as fluid for ordinary consumption. Class 2 is that which is devoted to the production of cream or butter or condensed milk, and the like. In the industry in general, and in the Chicago Milk Shed in particular, there is the recalcitrant and parasitic minority who shirk all obligation in connection with the surplus production.

22. Ninety per cent of the milk sold in the vicinity of Chicago, and ninety per cent of the milk produced in the Chicago Milk Shed, is handled through the farmers' organization known as the Pure Milk Association. Upon this group of producers, and upon the distributors cooperating with them the City of Chicago is almost wholly dependent for its supply of milk - a continuous and uninterrupted supply, and a supply which will meet the health standards necessary for the protection of the consumers. The distributors have established a system whereby, regardless of weather conditions and hazards, a supply of milk is always available for Chicago. The purchasers from this group take the entire output of the farmers. They pay first class prices for all of the milk sold as fluid, plus an average of 15% of this amount. The remainder is paid for at second class rates. The system provides certain safe guards against over-production and the demoralization resulting from a flood of cheap milk. It carries out the health safeguards in effect applicable to that city and declines encouragement to those violating them. It fixes the stable prices to be paid and to be charged, and tends to prevent unfair competition. It maintains comfortable wages for the workers. All of this great class of farmer producers and distributors of milk are supporting the marketing agreement and the license here in question.

23. The effect of an uncontrolled surplus of dairy products, unfair trade practices, and ruthless competition, strikes, and the physical obstruction and contamination of milk in transportation, inevitably tend to burden and break down the movement of this important commodity in interstate commerce. The regulation of the milk industry for the period of this emergency, in view of the industry's paramount importance and the peculiar evils to which it is subject, is essential to the preservation of this commerce and the protection of the public interest, and the preservation of an unimpaired national credit structure.

VI

The Character of the Competition Offered by the Plaintiff in this Suit and the Necessity for Regulation.

24. Outside of this group of milk distributors above referred to is a number of parasitic, unhealthful, unsocial, and unsafe business organizations. They exist by virtue of the sound structure maintained by the great majority of the industry. Living on the structure, like termites they continue to gnaw at the foundations, until it shall fall, crushing them and all within. Amongst these are the so-called wayside stands controlled by those parties which were joined as co-plaintiffs in the predecessor action at Chicago and who are supporting the actions before this Court. These stands have been located upon the fringes of the City of Chicago in order to avoid the health requirements of that City, while at the same time they have derived their support from the citizens of that City. Moreover, they have carried on their businesses in disregard of the less stringent health regulations under the Illinois State Laws. A number of these parties, members of the class here represented, have been convicted on charges of selling tainted milk and maintaining unclean and unsanitary premises and methods of operation. A number of such charges have been made against the very plaintiffs in these actions who, it may be assumed, are the best of the group which the class could select. Some of these charges are based upon inspections only a few days ago. Trials of these cases have been adjourned until after the hearing upon this application.

25. Communications from the Attorney General of the State of Illinois and the Superintendent of the Division of Foods and Dairies of the State of Illinois, have been received reciting the official reports of the inspectors and chemists who in the past two months have investigated the business of these two plaintiffs. The following quotations are made from some of those official reports on a few of the cases:

Plaintiff Beck:

"Findings. Adulterated: Sec. 8 - Sixth. In that it consists in whole or in part of filthy, tainted, and infected animal substances."

Plaintiff Economy:

"As dipped from the can into this container for the public *** no lid on can. No hot water equipment *** microscopic examination shows the presence of B Coli organisms. Sample is unfit for human food." Same Findings.

Plaintiff Economy:

"Conditions found. Equipment and utensils dirty, floors, tanks dirty, milk and cream not protected from flies, dust and dirt. Employees smoking. No hot water for sterilization."

Plaintiff Economy:

"Conditions found. No hot water. Cream being dipped from 10 gal. can in the rear room. Cans opened. No lids. Dipper in cans, also flies, bugs, and dirt. Exhibit cans in tanks of ice water. The color of milk sour, and flies. Floors, utensils, tanks, dirty. No drainage. Milk cans empty and not washed. Accumulation of dead flies on cans, tanks, and counter. Accumulation of garbage and decomposed cheese in rear of building. Open can full of flies and maggots. Same species of flies as we saw in the milk room."

26. The maintenance of an improper character of establishment and the handling of milk in an unsafe manner is a cheap method of doing business. Plaintiffs deliver milk over the country, not in the regular bottles used generally in this industry, but in various types of containers brought to the place of business by the customers. The dangers and the cheapness of such a system are obvious.

27. The refusal to undertake any social duty in connection with the surplus production of dairy products is one which strikes at the heart of the dairy industry. Continually expanded, it can only mean ruinous conditions for that industry. Plaintiffs buy such milk as they want, and the rest of it is thrown as an additional burden upon the shoulders of the class of concerns above described. This again, is a cheap method of doing business.

28. The wages paid by these plaintiffs and the class they represent are hardly more than half the wages paid by the other group of producers, and their hours of labor are severely long in comparison.

29. These are the practices and conditions which lay at the foundation of the ruthless price cutting and the unfair competition in which the plaintiffs are engaged. These are the conditions, and this is the trade and commerce which the plaintiffs ask a Court of Conscience to perpetuate.

VII.

The Economic and Health Value of the Delivery System.

30. Far from encouraging the purchase and consumption of milk, the dependence of the consumer upon store milk, particularly including the less convenient wayside stand supply, as distinguished from wagon delivered milk, has in fact decreased the trade. The proportion of store purchases increases with an increase in price differential and at the same time the total purchases by all modes of delivery drop off. (This is attributed to the unwillingness of the customer to make a trip to the store for each needed supply.) Attached hereto, marked Exhibit I and made a part hereof is a copy of a chart showing the per capita milk consumption in the United States from 1923 to 1931. The consumption of milk generally has increased from year to year until the depression. It has since decreased - and this is a cause for genuine concern to the government. Exhibit I also contains a chart of milk consumption in San Francisco from 1925 to 1932. As distinguished from the usual increase, the

consumption decreased in 1925-1926. A one-cent differential was in effect. In the pre-depression period of 1927-1928 when the price differential was two cents, consumption fell off rapidly, and since then the general trend downward has been more decisive than for the nation in general.

31. In Chicago, where the normal trend has been upward, along with the increase in population and the improvements in the distributive system, consumption has dropped off in the past four years by forty per cent, and by twenty per cent during the last twelve months, while the wayside stands were disturbing the markets by price cutting. Wagons formerly delivering 325 units of milk products average now 200 units. Numerous employees have been discharged and in order to enable the companies furnishing the great portion of Chicago's milk supply to meet the cut-throat competition threatening their business structure, the employees voluntarily took a substantial reduction in wages. It is of importance that along with the decrease in volume of sales the prices and income to the farmers have dropped precipitously. Not prosperous in 1929, the income of milk producers in that year was $2,300,000,000 or almost twice that in 1932.

VIII.

Plaintiff and those Whom he Represents Have Suffered no Injury Whatever.

32. Plaintiff is hardly in the position to assert the alleged ill effects and injury resulting from the application of the regulation of the Chicago Milk Market, not only in view of the fact that he has not been injured, but in view of the further fact that he rushed into the Federal Court at Chicago with an action similar to the present one within the first hour the license was in effect.

33. The operation of the Agricultural Adjustment Act and the license for the Chicago Milk Shed, as stated above, have not tended to diminish the business of the plaintiffs or those collaborating with them. They have not only not been irreparably damaged, but they have not suffered any injury at all. Reports from plaintiffs themselves and from others familiar with the situation point definitely to the conclusion that their businesses have not decreased. The wayside stands which today are thriving are a mushroom growth. About fifty of them existed when the Agricultural Adjustment Act was passed, while one hundred and fifty of them exist today. The plaintiff, Economy Dairy Company, was organized in November of 1932 at a time when steps were being taken to improve the conditions underlying the milk industry at Chicago. Plaintiff Beck went into the business only four months ago.

X *

34. It is noted that plaintiff has failed to treat as a part of his Exhibit A the entire license for the Chicago Milk Shed. In order that the Court and counsel may make reference to the entire license and the appendices, and may see the general plan involved, defendant makes the entire license and appendices, which are attached to the bill of complaint, a part of this return.

*See page 41.

35. Defendant will ask the Court to take judicial notice of the great nation wide economic emergency now in existence. This emergency vitally threatens the economic welfare of the country as a whole, and the agricultural industry in particular. The statute here in question is one of the cornerstones of the legislative structure designed to protect the commerce of the country and the nation in general against the serious results of economic distress.

36. Even if the facts set forth in this affidavit, or those subject to judicial notice, were insufficient, still the Supreme Court has said that if a state of facts could exist or could reasonably be conceived to exist which would justify the legislation, the existence of such facts must be assumed. The statute involved in this case is of signal importance to the Nation and the fact structure upon which it rests is vast and complicated. To grant the relief sought might produce a tragic effect upon the efforts of the Nation to proceed upon its upward route from the depths of economic distress and would involve a judicial re-appraisal of facts already appraised by the Congress and the Agricultural Adjustment Administration and would hardly seem consistent with the universal doctrine that courts will not lightly pass upon the constitutionality of an Act of Congress.

37. It is respectfully submitted that the appropriate administrative agencies should be left free to carry out the great purposes of this Act in a legal and orderly manner, and it is respectfully prayed that the rule be discharged and the bill be dismissed.

James Lawrence Fly
Special Assistant to the Attorney General

subscribed and sworn to
before me this 28th day
of August, 1932.

Edith C. Kidd
Notary Public

PARAGRAPH INSERTED IN THE BECK CASE, Equity No. 56059.

IX

Interstate Effect of the Plaintiff's Business

34. Plaintiff admits that he is operating a milk stand within the area defined by the license as the Chicago Metropolitan Area, and selling to consumers within that area. In metropolitan areas such as Chicago, where the milk supply comes from different states, the distributing system must be considered as a unit, even though some of the distributors obtain their supply solely from within the state. These supplies are in direct and continued competition. It is impossible to effectively regulate the one without regulating the other. The Secretary of Agriculture has so found, as shown by the license, page 3 thereof, as follows:

> "Whereas the Secretary finds that the marketing of milk for distribution as fluid milk in the Chicago metropolitan area and the distribution of said fluid milk effects and enters into both the current of interstate commerce and the current of intrastate commerce which are inextricably intermingled; and
>
> * * * * * * * * * * * * * * * * *
>
> "Whereas the Secretary finds that practices and charges contrary to the several provisions of said agreement would constitute unfair practices and charges that would prevent or tend to prevent the effectuation of the declared policy of the act with respect to milk and its products and the restoration of normal economic conditions in the marketing of milk or its products and the financing thereof, and finds that licenses should be issued as hereinafter provided to eliminate such practices and charges, - "

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy, Incorporated, Plaintiff,	)	
v.	)	In Equity No. 56058
Henry A. Wallace, Defendant.	)	

AFFIDAVIT OF MORDECAI EZEKIEL, ON THE ECONOMIC ASPECTS OF THE AGRICULTURAL ADJUSTMENT ACT AND THE CHICAGO MILK MARKETING AGREEMENT.

Mordecai Ezekiel, being duly sworn, says:

I am Economic Adviser to the Secretary of Agriculture.

This affidavit, treating with the economic aspects of the statute and the industry here involved, is made in opposition to plaintiff's motion for a temporary injunction and in support of defendant's motion to dismiss the bill.

An outline of my economic training and experience is as follows:

Graduated University of Maryland, 1918, degree of B.S. in Agriculture; M.S. from University of Minnesota, 1923; Ph.D. from Robert Brookings Graduate School of Economics and Government 1927; Economist with Division of Farm Management, U. S. Department of Agriculture, 1922-1930; Guggenheim Fellow for Economic Research in Europe, 1930-31; Assistant Chief Economist, Federal Farm Board, 1930-1933; Economic Adviser to the Secretary of Agriculture since March, 1933.

I. Existence of the emergency.

A national emergency led to the passage of the Act. Every economic and social indicator testified to the increasing economic chaos--falling prices, heavy and increasing unemployment, industrial output at unprecedentedly low levels, wide-spread bank failure, 1/ and growing social unrest and revolutionary spirit, especially among farmers. 2/

1/ Sec. (a) Fed. Res. Bull. Apr. 1933 pp 219, 230, 245.
2/ Farmers Strikes & Riots in the U.S.; Bibliography of U.S. Department of Agr. August, 1933.

The disparity between the prices of farm products and other products had existed since 1921, and was sharply intensified from 1929 to 1933. 3/ Cash income available for farm living expenditures dropped from six billion dollars in 1925 to one and three-tenth billion in 1932. 4/ The low buying power of farmers intensified the industrial depression, and weakened the agricultural assets behind the whole national credit structure. 5/ The low prices and excessive supplies of farm products burdened and obstructed the normal currents of domestic commerce, and led foreign countries to build barriers to international trade continually higher, reducing the flow of world trade to a small fraction of its usual volume. 6/

Private action had proved impotent to check the debacle. In the interest of the whole public the Government must take comprehensive and effective steps to restore economic activity, or confess its inadequacy to guard the welfare of its citizens.

II. Need for the policies stated in the Act.

The policies specified in the Act are in accord with the economic needs and with the requirements of social justice and progress.

Production and consumption must be balanced if farm purchasing power is to be restored. Attempts to advance prices have always failed because they disregarded the necessity of adjusting production to consumption. 1/ Such readjustments must recognize the price to be established; in fairness to farmers, the prices must be determined relative to prices of goods that farmers buy. The period 1909 to 1914, when agricultural and industrial production and prices were well balanced, and the national income was equitably distributed, provides a just and practicable standard for judging this parity.

But the power to increase farm returns must be limited, if undue burdens on consumers are to be avoided, and agricultural stability to be maintained. The bill embodies numerous provisions for the protection of consumers - the parity price maximum, the limitation on the proportion of the consumers' dollar returned to farmers, and direction that processing taxes, even within the parity limits, shall not be such as unduly to depress consumption.

Modifications were likewise needed in marketing institutions. Methods of selling farm products were defective in many cases, and threw an unjust burden on the farmer, especially during period of falling prices and changing demand conditions. Group action, in cooperation with the Government, was necessary to correct these difficulties. 2/

3/ See Reports of the Land Grant College Assn. on Agr. Situation in 1927 and in 1932.
4/ L. H. Bean, Facts Relating to Agr. Situation, May 1933 Report of U.S.D.A. to I.C.C. Docket #26,000.
5/ Business & Agr. 1920-1933, Bibliography of U.S.D.A. August 1933.
6/ Senate Document No. 70, 73rd Congress, 1st Session, World Trade Barriers in Relation to American Agriculture, 540 pages 1933.
1/ Food control during 46 centures Lacy, Mary G., Scientific Mo. Vol. XVI, No.6 Je. 1923.
2/ Unfair practices in mkt. of Agr. Prod. Bibliog. U.S.D.A. Aug. 1933.

III. Adequacy of the Powers Granted by the Act.

To carry out the stated policies, the Act places in the hands of the Secretary of Agriculture definite powers:

(1) To secure the cooperation of farmers in coordinating production with consumption;

(2) To bring the farmer's return for his production for domestic use up to a fair price, regardless of the world price-level;

(3) To arrange with processors and distributors of farm products to eliminate wasteful or inequitable methods and practices; and

(4) To prevent individual concerns from following methods which would prevent these operations from being carried through effectively.

Character of the Problem to be Solved: The foreign demand for American farm products, increased by the War, shrank steadily in the past decade; domestic demand also declined; the wide use of autos, trucks, and tractors alone replacing livestock which had consumed the produce of nearly 20,000,000 acres.1/ Farm production had expanded in response to the war demands, but failed to contract after that need had passed. 2/ Continued production, in the face of declining demand, led to falling prices and to the physical accumulation of excess supplies. The depression beginning in 1929 still further reduced the demand for farm products; weakened the urban buying power for products sold on the domestic market, and sharply curtailed the consumption of products such as cotton, which go to industrial uses. 1/ Neither the six million individualistic farmers, nor the institutions engaged in marketing the several products, were able to provide the needed control. 3/

Failure of Previous Attempts. During the past decade, many methods were tried to balance production and improve farm prices. Government agencies distributed information on the economic outlook for the various farm products, to guide planting 1/; cooperative associations tried, by advising members, manipulating markets, or storing supplies, to increase the price 2/; and even the Federal Government tried to stabilize prices through the Farm Board's operations. All methods failed to check the continually growing surpluses. Domestic carry-overs of exportable farm products increased steadily from 1929 to 1930 to 1932, when they amounted to 2 to 4 times the normal amounts. 2/ The Farm Board itself reported its inability to cope with the problem, and asked Congress for additional powers. 3/

1/ L. H. Bean, Recent Economic Trends Affecting Agr. U.S.D.A. July 1933 pp.20, 4, 26, 31, 32, 33. Regional Changes in Farm Animal Production in Relation to Land Utilization. Oct. 19, 1929 p. 16, U.S.D.A.
2/ E. G. Nourse, Our Wheat Surplus, Foreign Affairs, 11 (3) 447-457, Apr.1933.
3/ Agriculture: Illustrating Limitation of Free Enterprise as a remedy for Present Unemployment, M. Ezekiel, Journal Am. Stat. Assn. Mar. 1933.
1/ Tolley, H. R., The History and Objectives of Outlook Work; Jour. Farm Econ. XIII, pp.523-534, Oct. 1931; The Agricultural Outlook for 1933, U.S.D.A.
2/ Federal Farm Board, Recommendations for Legislation, pp. 3-5, Dec. 7, 1932.
3/ American Institute of Cooperation; American Cooperation, 1932, pp.185-246; Federal Farm Board, 3rd Annual Report, p. 23, 1932.

Meanwhile marketing agencies were losing what little coordinating power they had developed. The fluid milk marketing systems which farmers' co-operatives had developed were breaking down, one by one. 3/ The sharp drop in domestic consumer demand, and the inability of the existing marketing agencies to readjust to changing conditions, led to partial or complete cessation of merchandising operation in many specialized commodities, and to severe and uneconomical geographic shiftings in production.

Federal Action Necessary. Farm commodities move in national and international commerce; even the minor products have nation-wide markets and distribution. No local or state government could cope effectively with the problems involved; only the Federal government could deal with them. In fact, concerted action by many governments may be necessary in some cases. The International Wheat Agreement, just completed at London, constitutes a notable step towards world-wide cooperation in correcting one of the underlying causes of the depression. 2/ Our participation in this agreement would have been impossible without the powers granted by the Agricultural Adjustment Act.

Fundamental Character of the Operations Made Possible. Previous attempts at solving the surplus problem failed because they attempted to raise prices without controlling or adjusting production. Similarly, previous attempts at solving marketing problems failed because they attempted to change costs or charges without correcting the inefficiencies which gave rise to those charges. This act does not attempt to get results by dealing with surface symptoms. Instead, it provides means for going to the basic economic difficulties which give rise to those symptoms, and for correcting the maladjustments - in production, in marketing methods, in lack of direction or coordination. With the basic causes corrected, the surface symptoms - prices and returns - will then correct themselves. Unbiased students of the farm problem such as the Chamber of Commerce of the United States and the Land Grant College Association have recognized that only by such fundamental changes would recovery in agriculture be secured. 3/

The Act grants the Federal Government adequate power to help farmers, and those who process and market farm commodities, to make those needed changes in their industry which they have been unable to make for themselves. The economic facts, and the records of past experience, indicate that such changes must be made before the essential balances between agriculture and industry

3/ American Institute of Cooperation; American Cooperation, 1932, pp.185-246; Federal Farm Board, 3rd Annual Report, p. 23, 1932.
1/ For examples, see charts in "Fruits: Apples, Citrus, Peaches, etc. Outlook charts, 1932. Bur. of Agr. Econ., U. S. Dept. of Agri., negative Nos. 23722A, B, C, D, E, and 23753, 23743B.
2/ See N. Y. Times Aug. 26, 1933, pp. 1 & 2.
3/ Assoc. of Land-Grant Colleges and Universities, Report of the Agr. Sit. 1927, ditto 1932; Chamber of Commerce of the United States, Agricultural Service, Agriculture in Relation to Business, 1932.

can be restored. Only so can a firm foundation of farm prosperity be provided as a major step toward lasting economic recovery.

(Sgd) Mordecai Ezekiel

Subscribed and sworn to before
me this 27th day of August, 1933.

(Sgd) Nellie G. Plumley

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy, Incorporated,)
)
Plaintiff,)
)
v.) In Equity No. 56058
)
Henry A. Wallace,)
)
Defendant.)

AFFIDAVIT OF E. W. GAUMNITZ, ON THE ECONOMIC SITUATION IN THE DAIRY INDUSTRY AND IN THE CHICAGO FLUID MILK AREA

E. W. Gaumnitz, being duly sworn, says:

I am Economic Adviser to the Dairy Section of the Agricultural Adjustment Administration. This affidavit, treating with the economic aspects of the dairy industry and of the Chicago market area, is made in opposition to plaintiff's motion for a temporary injunction and in support of defendants's motion to dismiss the bill.

An outline of my economic training and experience is as follows:

Graduated University of Minnesota, 1921, degree of B.S., and subsequently received degrees of M. A. and Ph. D.; Instructor and Assistant Professor of Agricultural Economics, University of Minnesota, 1921-1925; Agricultural Economist, Dairy Production, Iowa State College, 1925-1928; Agricultural Economist, California State Department of Agriculture, 1928-1930; Agricultural Economist, Market Research in Dairy Products, Bureau of Agricultural Economics, U. S. Department of Agriculture, 1930-1933; Economic Adviser, Dairy Section, Agricultural Adjustment Administration, since May, 1933.

I. <u>There is a crisis in the dairy industry of the United States.</u>

Prices of dairy products are low compared with prices of industrial products, thus curtailing the purchasing power of dairy farmers and contributing to the agricultural and industrial depression. Dairy prices are below the price parities specified by the Agricultural Adjustment Act. Production in the face of low prices has not been reduced; in fact, it was even increased with the decline in prices.

Further expansion is imminent: the number of cows and heifers on farms is larger than at any time in the history of the United States.

This domestic situation cannot be corrected through the disorganized efforts of 4,500,000 farmers producing dairy products. There is now practically no foreign outlet for surplus dairy products.

II. There is a similar emergency among the dairy producers in the Chicago Area.

Surplus production depresses prices below prewar parity, and production is continuing to increase. Individual action has so far failed to remove the surplus or to correct the price disparity, and has brought about a chaotic condition in the marketing of dairy products in this area.

III. The conditions set forth in Title I, Section 2, paragraphs 1, 2, and 3 in the Chicago agreement are fulfilled, or tent to be fulfilled by this agreement.

The prices set forth represent increased returns to producers in terms of what things farmers buy, but do not exceed "parity" as defined.

The percentages of the consumer's dollar returned to Producers of dairy products under this agreement does not exceed the percentage returned in the base period as defined in the Act.

IV. This agreement conforms to the terms of the Act in that as set forth in Title I, Part 2, Section 8, Paragraph 2, that this is an agreement with processors, associations of producers, and others engaged in the handling of dairy products in the current of interstate commerce, the dairy products in interstate commerce in the Chicago milk area are inextricably mingled with the products moving within the State.

V. The particular complaints cited by the plaintiff are without foundation, are not in the public interest, and would, if upheld, prevent the effectuation of the policies set forth in the Act.

(a) There has been no differential between store retail prices for milk and delivered retail prices for milk under conditions previously existing in the Chicago market over the past ten years, except for the recent wayside stands.

(b) The Board of Health of the City of Chicago has deemed it necessary for the protection of the public health to require milk to be pasteurized and bottled.

(c) The retail price proposed by the plaintiff is inadequate; it does not permit payment of customary wages and salaries, or returns to the producers for comparable grades and quality of milk as high as those stipulated in the agreement.

(d) The lower price proposed by the plaintiff would lower the entire retail milk price structure in the Chicago area and reduce prices to producers. Should other concerns

adopt plaintiff's mehtods, the market would be disrupted and neither plaintiff nor the other concerns could operate successfully.

(e) The method of distribution and the prices proposed by the plaintiff are contrary to social interest.

VI. The agreement does not deprive the plaintiff of the opportunity to engage in the production or distribution of milk in accordance with the provisions of the agreement.

VII. Adherence to the provisions of the agreement is necessary to effectuate the declared policies of the Act -- restoring pre-war parity prices to producers gradually and returning to the producer no more than the pre-war portion of the consumer's dollar -- and to prevent a reversion to the price chaos prevailing previous to the formation of the agreement.

(Sgd) E. W. Gaumnitz

Subscribed and sworn to before me
this 27th day of August, 1933.

(Sgd) Nellie G. Plumley
Notary Public.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Economy Dairy Company Incorporated In care of Dodds & Burkinshaw Shoreham Building Washington, D. C. Plaintiff,	)	
vs.	)	Equity No. 56113
Henry A. Wallace The Secretary of Agriculture Washington, D. C. Defendant.	)	

ORDER DISCHARGING RULE, DISMISSED BILL AND DENYING APPLICATION FOR TEMPORARY INJUNCTION

This cause having duly come on for hearing August 28, 1933 on the original bill filed herein and the rule to show cause why a preliminary injunction should not issue, and the three affidavits in opposition to the application for a temporary injunction and the defendant's motion to dismiss the bill of complaint, and having been argued by counsel and considered by the Court it is, this 31st day of August, 1933, by the Court:

ADJUDGED, ORDERED AND DECREED that the rule to show cause be discharged and the application for a preliminary injunction be denied, and that the bill filed herein be dismissed at the cost of the plaintiff.

Daniel W. O'Donoghue
Associate Justice

From the foregoing order and decree the plaintiff notes an appeal in open court; and the bond on such appeal is hereby fixed at $100 or $50 Cash dollars.

Daniel W. O'Donoghue

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding an Equity Court.

ECONOMY DAIRY CO., Inc., Plaintiff, vs. HENRY A. WALLACE, Defendant.	IN EQUITY No. 56058.
MILTON R. BECK, Plaintiff, vs. HENRY A. WALLACE, Defendant.	IN EQUITY No. 56059.

Washington, D. C.

Tuesday, August 29, 1933.

DECISION OF THE COURT in the above cases, by Mr. Justice O'Donoghue, sitting in the Motions Court, the Supreme Court of the District of Columbia, on Tuesday, August 29, 1933, at 10 o'clock a. m.

APPEARANCES:

Dodds & Burkinshaw,

Representing the Plaintiff.

James Lawrence Fly, Special Assistant to the Attorney General,

Representing the Defendant.

THE DECISION OF THE COURT.

The Court (Mr. Justice O'Donoghue). In the two cases of Economy Dairy Co., Inc. vs. Wallace and Beck vs. Wallace the Court finds that a national emergency exists, and that the welfare of the people and even the very existence of the government itself are in peril.

The day is past when absolute vested rights in contract or property are to be regarded as sacrosanct or above the law. Neither the necessities of life nor commodities affected with the public interest can any longer be left to ruthless competition or selfish greed for their production or distribution.

The Court finds that the Agricultural Adjustment Act passed by Congress May 12, 1933 is constitutional, and that the regulations and licenses promulgated and issued thereunder are reasonable and valid. Citing People of the State of New York vs. Leo Nebbia, Court of Appeals of New York 355, decided July 11, 1933.

Accordingly the Court discharges the rules to show cause, and refuses to grant the temporary injunctions in these two cases, and grants the motions to dismiss the two bills of complaint.

Mr. Burkinshaw. If the Court please, plaintiffs in each case respectively except to the action of the Court in discharging the rule, refusing the temporary injunction, and dismissing the bill of complaint. At this time the plaintiffs in each case give notice of application for a special appeal, if the Court please.

The Court. Here are the papers and briefs. Counsel may get them from the clerk. There is another case that was set for the 1st of September. I think that case should be advanced to the 31st of August for disposition, since it is a kindred case to this. Do you know the case that I have in mind?

Mr. Dodds. Yes, Your Honor.

The Court. The 31st.

Mr. Fly. Yes, Your Honor, I do. There is one thing that --

The Court. Well, if you do not wish it heard. I think Mr. Dodds wanted it heard, and it was to be heard on the 1st of September.

Mr. Dodds. I would be glad to have Your Honor determine that case before he leaves the term.

The Court. There is no reason why that should go over to another judge, unless it has some other propositions than that involved here.

Mr. Fly. We will agree to that, Your Honor.

The Court. That is set then for the 31st of August. Have you filed

your motions to dismiss?

Mr. Fly. Yes, Your Honor. I left them on your desk this morning.

The Court. Do you want them filed as of yesterday?

Mr. Fly. Yes, Your Honor.

The Court. They will be so filed. The other case then will be heard on the 31st.

(Which were all the proceedings had in the above cases at this time.)

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding an Equity Court

Economy Dairy Company, Incorporated,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Equity No. 56,058
	)	
Henry A. Wallace,	)	
	)	
Defendant.	)	

DESIGNATION OF RECORD

The Clerk will please prepare the record on appeal in the above entitled cause, including therein:

1. The following papers in full:

   (a) Bill of complaint;

   (b) Rule to show cause issued thereon;

   (c) Affidavits of defendant in answer to rule to show cause;

   (d) Defendant's motion to dismiss bill of complaint;

   (e) Final decree discharging rule to show cause, denying preliminary injunction, dismissing bill of complaint, fixing penalty on appeal bond, etc.;

   (f) Memorandum opinion;

   (g) Assignment of error;

   (h) This designation.

2. Memorandum only of the following:

   (i) Undertaking an appeal.

Nugent Dodds

Neil Burkinshaw
Attorneys for Plaintiff.

Service of a copy of the foregoing designation of record acknowledged this 6th day of September, 1933.

James Lawrence Fly
Attorney for Defendant.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding an Equity Court.

Economy Dairy Company, Incorporated,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Equity No. 56,058
	)	
Henry A. Wallace,	)	
	)	
Defendant.	)	

ASSIGNMENTS OF ERROR

The plaintiff in the above entitled cause assigns errors to the decree herein of August 29, 1933, as follows:

1. The Court erred in not holding the Act of May 12, 1933, entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," commonly known as the Agricultural Adjustment Act, repugnant to the Constitution of the United States, and void, and in holding said Act valid and constitutional.

2. The Court erred in not holding the "License for Milk - Chicago Milk Shed" and the regulations promulgated by the defendant herein as unreasonable, discriminatory, confiscatory and void, and in holding said license and regulations reasonable and valid.

3. The Court erred in refusing to grant a preliminary injunction.

4. The Court erred in discharging the rule to show cause.

5. The Court erred in sustaining the motion of the defendant to dismiss the bill of complaint, and in dismissing said bill.

6. The Court erred in other respects apparent of record.

Nugent Dodds

Neil Burkinshaw
Attorneys for Plaintiff.

Service of the foregoing assignments of error acknowledged this 6th day of September, 1933.

James Lawrence Fly
Attorney for Defendant.